Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 82-396

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TWIN CITY SPORTSERVICE, INC., et al.,
Petitioner,

vs.

CHARLES O. FINLEY & COMPANY, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

WILLIAM G. MYERS
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345
Counsel of Record for Respondents

ROTHSCHILD, BARRY & MYERS
Two First National Plaza
Chicago, Illinois 60603
Of Counsel

Pandick Press Midwest, Inc., Chicago • (312) 454-7600

QUESTIONS PRESENTED

The questions stated by petitioner are not truly presented by this record since:

1. The courts below gave proper attention to the anticompetitive impact of the acts and practices found to constitute an unreasonable restraint of trade.

2. All elements of an attempt to monopolize were made out by the evidence; the finding of that violation did not depend upon indulgence in any presumption.

3. Damages were awarded to compensate for antitrust injury which was sustained in fact; those damages were calculated on a proper basis and were not awarded "automatically". Moreover, the issues raised by the petition regarding injury and damages were not presented below.

PARTIES INVOLVED

Charles O. Finley & Company, Inc. ("Finley") has no parent, subsidiary or affiliate corporations. Following adoption of a plan to liquidate Finley, the individual respondents*, as its shareholder-distributees, were added as additional parties by an agreed order entered in the Court of Appeals.

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* Charles O. Finley, Shirley M. Finley, Charles O. Finley, Jr., Paul M. Finley, Sharon Kessling and Kathryn Perlmutter.

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ABBREVIATIONS AND TERMS USED IN THIS BRIEF

"Sportservice"—

Although used throughout in the singular, this term includes the entire "Sportservice System", a group of over a hundred corporations headed by Emprise Corporation. Emprise owns the stock of Sportservice Corporation, which owns the stock of the petitioner, Twin City Sportservice, Inc. The latter is the successor in interest of Penn Sportservice, Inc. Each of the above corporations, and their subsidiaries, affiliates, officers and agents, are covered by the term "Sportservice".

"Athletics Contract"—

The contract upon which the original complaint was based, being an agreement dated September 25, 1950 and all amendments or modifications thereof.

"94a"—

An example of a reference to a page of the Appendix in this Court (here p. 94).

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OPINIONS BELOW

Omitted from mention by petitioner are unreported memorandum opinions issued by the District Court on July 20, 1979 and March 31, 1980. For the most part, those opinions dealt with issues pertaining to relevant market, interest and attorney's fees—matters not raised by the petition and thus not relevant here. But a portion of the July 20, 1979 opinion made corrections to findings set forth in the opinions dated March 31, 1977 and December 28, 1978 which are reproduced by petitioner as Appendix B and Appendix C, respectively (43a-76a).

Since those corrections provide the predicate for the 24% market share referred to by the Court of Appeals (6a, 11a, 12a), the relevant portion of the July 20, 1979 opinion is reproduced as Appendix K to this brief.

STATEMENT OF THE CASE

The judgment below is supported by a voluminous record[1] compiled at separate bench trials before two different judges: Justice Tom C. Clark, who entered judgment for Finley in 1972, and Chief Judge Robert F. Peckham, who entered judgment for Finley in 1979.

The necessary starting point for consideration of the petition is a reading of the multiple opinions of the courts below (1a-128a, 160a-161a), commencing with Justice Clark's 1972 opinion (94a-128a). The latter opinion is of special significance because key findings and conclusions stated therein were incorporated by reference in the opinion of Judge Peckham[2]. After independently reviewing the prior record together with the additional evidence adduced before him, Judge Peckham was in "complete agreement" with the incorporated portions of Justice Clark's opinion[3]. 53a n. 2; 58a n. 12.

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[1] The record includes more than 7,800 pages of transcript, developed through the testimony of 58 witnesses over 39 trial days held during the past 15 years; and approximately 1,000 exhibits, most of which are multi-page and many of which are complete volumes in themselves.

[2] Judge Peckham also incorporated significant segments from trial court briefs filed by Finley (53a n. 3; 54a n. 8, 9; 55a n. 11; 58a n. 12) which also were before the Court of Appeals.

[3] The Court of Appeals noted the continuing relevance of Justice Clark's findings. (23a n. 13). And, it was Justice Clark's opinion which first fixed Finley's single damages at $282,168—an amount with which Judge Peckham agreed and which constituted the basis for the final judgment below. 58a.

The opinions below portray the nature and history of the case and provide a full background for consideration of the petition. But the tenor of the petition requires clarification of the setting in which this litigation commenced.

Finley never has entered into a concession contract with anyone[4]. It purchased the Athletics in 1961, when the team was playing in Kansas City and concessions were being handled pursuant to the 1950 Sportservice contract involved in this litigation[5]. When Finley moved the team to Oakland in 1967, the local stadium already was encumbered with a concession contract which the municipal authorities had awarded to Volume Service Company in 1966 following competitive bidding[6]. Since Volume and Sportservice both claimed contract rights as to the same stadium, litigation followed. Sportservice instituted this action in an effort to oust the incumbent concessionaire, to follow the Athletics baseball franchise to Oakland, and to stay there for 16 more years.

At the time this action was commenced, the Athletics' Contract already had enabled Sportservice to enjoy the benefits of performance over 34 baseball seasons[7]. Sportservice claimed

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[4] Thus, Sportservice is doubly inaccurate in suggesting that Finley has sold its concession rights twice (Petn. 2, 5).

[5] Since Finley was not a party to the Athletics Contract, it is absurd to characterize that agreement as Finley's "freely bargained contractual obligation" (Petn. 5).

[6] It is simply not true, as Sportservice states (Petn. 3), that Finley "entered into a new contract with the concessionaire who was then operating at the Oakland Stadium". See 79a, 96a.

[7] Pursuant to the Athletics Contract, Sportservice had served at 17 seasons for the Phillies National League team in Philadelphia, 4 seasons for the Athletics American League team in Philadelphia, and 13 seasons for the Athletics in Kansas City.

another 16 years because its "follow-the-franchise" provisions[8] had the effect of allowing the stated contract term of 33 years to cover 50 baseball seasons[9], as well as professional football and all other events conducted at the stadia to which the contract could be attached.

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[8] According to the petition, Sportservice's follow-the-franchise provisions merely permit a concession contract to remain in effect when a team moves (Petn. 3, n. 1). But they do much more. Sportservice obtains the equivalent of lien rights with respect to the stadium at which a team is operating at the time of the original concession contract. When a team moves, Sportservice stays on at the original stadium and *also* moves with the team to the new stadium. These provisions serve to make two contracts out of one. The Athletics contract enabled Sportservice to control the stadia in both Philadelphia and Kansas City.

[9] 17 seasons for the Phillies and 33 for the Athletics.

REASONS FOR DENYING THE WRIT

This case presents no question of national importance. Its impact is limited to the immediate parties, and the Court of Appeals expressly declined to formulate a decision of broader applicability (22a, 24a). The courts below did not purport to establish any new rule of law or to depart from any old ones. While Sportservice contends that certain existing decisions of this Court were not properly applied, it does not seriously suggest that any new waters need be charted.

As the voluminous record attests, this case was fought in the trenches on a fact-by-fact basis. It was decided on a factual basis. It presents no question of law which, if resolved in favor of Sportservice, could change the result below without further detailed consideration of the particularized facts. Those facts already have been found twice, separately and independently but with identical results, by two highly respected trial judges. And, after two appeals, not one of the eight federal judges below has been able to identify a single procompetitive aspect of the acts and practices of Sportservice. On the contrary, there has been no dissent from the most condemning finding of all, first made by Justice Clark in 1972, that the conduct of Sportservice over a period of more than 25 years has been in furtherance of a specific intent to restrain and to monopolize. 119a-122a.

The two Sherman Act violations established below are challenged separately in the first two parts of the petition. But, if the ultimate result as between the parties is to be altered, it would be necessary to set aside *both* violations. For the damages sustained by Finley were the same, whether resulting from violation of Section 1, Section 2, or both.

The third part of the petition, relating to injury and damages, is not worthy of consideration. Apart from their lack of merit, the issues there discussed were not raised below.

I.

THERE IS NO NEED OR REASON TO REVIEW THE FINDING OF UNREASONABLE RESTRAINT OF TRADE, WHICH WAS FULLY WARRANTED BY THE RECORD AND IN ACCORD WITH SOUND ANTI-TRUST ANALYSIS

Contrary to the contentions of Sportservice, the courts below did not ignore impact on competition[10] in finding a violation of Section 1 of the Sherman Act. Nor did the finding of that violation follow from a "merely mechanical" application of a quantitative substantiality test (Petn. 6-8). It is undisputed that the blanketing of 24% of any market with exclusive contracts satisfies any quantitative requirement under the "substantial share" test of *Tampa Electric*. But the courts below, applying the rule of reason, relied on a host of additional factors as well.

In sum: Sportservice, the largest concessionaire in the world, has locked up 24% of a unique market (comprised of a limited number of individual monopolies) for unreasonably long periods of time through exclusive contracts which were procured through the predatory use of its deep pocket, through conspiratorial conduct, and through the use of deceptive and restrictive contractual provisions, including its "follow-the-franchise" clauses. In all of this—in attaining and enhancing its dominant position over a period of more than 25 years—Sportservice has been driven by a specific intent to restrain trade. It has succeeded in blocking competition by restraining its competitors as well as the parties with whom it deals. No attempt has been made to show that the acts and practices of Sportservice promote competition, and the few

[10] Each of the courts below was keenly aware of the tests established by *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320. Indeed, Justice Clark authored that opinion. Thus, the opinions below are replete with passages in which anticompetitive impact was expressly considered and discussed. See, e.g., 10a, 12a, 13a, 18a, 19a, 26a, 27a, 48a, 51a, 52a, 54a, 55a, 57a, 89a-91a, 116a-112a.

lame excuses offered for its conduct have failed to withstand scrutiny by the courts below. These are the cumulative findings which must be overcome in order for Sportservice to prevail.

Sportservice strives to single out particular factors underlying its Section 1 liability and to argue, at one point or another, that each such factor constituted the sole basis for Finley's recovery. But the case was presented to, and decided by, the courts below on the basis of the aggregate of circumstances presented by the record. No reported decision has allowed an antitrust defendant to escape under comparable facts. There is no conflict among the circuits as to any issue presented, and there is no need to clarify any prior decision of this Court. This case involves nothing more than the application of classic rule of reason analysis to the particular facts. These observations remain true even if each factor underlying liability is examined separately.

Nature of the defendant. Established for more than 60 years, and with concession revenues in excess of $100,000,000 per year, Sportservice is the world's largest concessionaire and is "dominant" in the marketplace. See 52a, 53a, 57a. The record unequivocally supports the conclusion that Sportservice has attained its dominant position through the use of "contracts to stifle competition rather than to serve legitimate economic needs". *Standard Oil Co.* v. *United States*, 337 U. S. 293, 308.

Special nature of the market. The number of available concession franchises is limited. "This is not a situation where by the nature of the market there is room for newcomers, irrespective of the existing restrictive practices." *Federal Trade Commission* v. *Motion Picture Advertising Company*, 344 U. S. 392, 395. Moreover, each franchise itself constitutes a monopoly. Once obtained, there can be no competition for the business opportunity presented thereunder until the contract expires. Control over 24% of such a market is vastly more dangerous than control over a similar percentage of retail

outlets for consumer goods or a similar percentage of product sales. In the latter cases, competitors remain free to capture all or any part of the market at any time through competition as to price, quality, quantity or service, and a market share present today literally can disappear tomorrow. Here, in contrast, the market position of Sportservice is not subject to the vagaries of continuing competition.

Contract length. If long term contracts used by other parties in other settings are proper and commonplace as the petition suggests (pp. 8-9), they are not threatened by the opinion below. The Court of Appeals emphasized that it was not condemning the length of contracts not before it, and was not suggesting that any particular contract length is *per se* unreasonable. See, e.g., 13a-14a, 22a, 24a. But, even though the findings below concerning unreasonable contract length cannot be applied generally in other litigation, they clearly were warranted as between the parties here. Whether one focuses on the 33 year term of the Athletics Contract (covering 50 baseball seasons) or on its other contracts, ranging up to 100 years, the length of Sportservice contracts is ridiculous. The long term is the trademark of Sportservice and the key to its position of dominance. Yet such terms are not required for any legitimate business purpose; neither now nor at any time in the history of this litigation has there been even a lawyer's explanation as to why such long terms are necessary.

This Court has pointed to contract length as an indicator of illegality.[11] There can be no debate as to applicable standards:

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[11] "Likewise bearing on whether or not the contracts were being used to suppress competition, would be the conformity of the length of their term to the reasonable requirements of the field of commerce in which they were used." *Standard Oil Co* v. *United States*, 337 U. S. 293, 308. This classic statement was supported by approving reference to the passage from *United States* v. *Pullman Co.*, 50 F. Supp. 123, 129 (E. D. Pa. 1943), *aff'd.*, 330 U. S. 806, quoted by Justice Clark at 118a.

the test is clear; the courts below simply found that Sportservice has failed it. In other cases, this Court has condemned, or approved condemnation of, contracts of far shorter duration than are involved here.[12]

Anticompetitive effects. With the execution of each of its contracts, the competitive position of Sportservice became impregnable as to the franchise there involved. Multiplied by the number of its contracts, and then by the number of years for which each monopoly was locked up, the system has resulted in an irretrievable reduction of competition. The foreclosed share must stay beyond the reach of competition for a generation or two. Meanwhile, the long term relationship provides Sportservice with unique ability to procure renewals and extensions without the intrusion of competition, and the operation of its follow-the-franchise provisions serves to enlarge the scope of the contracts already captured. At the same time, as Sportservice enjoys immunity from competition for existing accounts, it remains free to enhance its market share by locking up additional franchises at the expense of competitors who are either unable or unwilling to emulate its practices.

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[12] See, e. g., *Federal Trade Commission* v. *Motion Picture Advertising Company*, 344 U. S. 392, 394 (system of exclusive contracts running up to 5 years, the majority being for 1 or 2 years, held to violate the Sherman Act because "unduly restrictive of competition when they extend for periods in excess of one year"); *Schine Chain Theaters* v. *United States*, 334 U. S. 110, 118 (franchise agreements running for 2 or 3 years held to be unreasonable restraints); *United States* v. *Grinnell Corp.*, 384 U. S. 563, 578 (5 year contracts observed to "constitute substantial barriers to competition" and thus relief on remand to be fashioned to deprive them of "the coercive power that they apparently have had towards restraining competition"); *United States* v. *Standard Oil Company of California*, 362 F. Supp. 1331, 1341 (N. D. Cal. 1972), *aff'd.*, 412 U. S. 924 (requirements contracts of 5 or 10 years duration found "in and of themselves" to constitute unreasonable restraint).

As Justice Clark noted, "The vices of these contracts need not be belabored". 119a. The existing and potential restraint upon competitors and competition is obvious. But the courts below also have found impact upon those who would benefit from competition—the teams or facility owners granting franchises. As both trial judges found, the teams do not want the long terms and are adversely affected thereby. They lose control over quality of the concession services rendered, and they realize less income because of the low rates which accompany long term contracts. 120a. Given the manner in which Sportservice operates, it is usually a successor in interest, such as Finley, who must pay the price for market foreclosure. As the record shows, this is not by accident.

Follow-the-franchise provisions. As has been seen (p. 4, n. 8, *supra*), these provisions have the effect of making two contracts out of one when a team moves.[13] They also have been employed to enable Sportservice to skirt the competitive bidding requirements of public bodies and to gain access to various facilities through private negotiations with parties other than those owning the facilities.[14] In all cases, Sportservice has used

[13] The Athletics moved to Kansas City in 1955. In 1954, when the St. Louis Browns moved to Baltimore, a follow-the-franchise, provision enabled Sportservice to hold the St. Louis stadium, where the National League Cardinals stayed on, while at the same time capturing the stadium in Baltimore without competition. Within a year, 2 contracts had placed Sportservice in control of 4 major league stadia—not only for baseball, but for professional football and all other events conducted at the stadia. See 55a n. 11. Later, it was a follow-the-franchise provision which enabled Sportservice to tie down Milwaukee County Stadium without competition, ousting the incumbent concessionaire in the process. 115a.

[14] For example, when expansion baseball teams were awarded to Seattle and Montreal, neither city had a suitable stadium, but both planned to build new ones. In both cases, the team was to play in small below-standard stadia on a temporary basis. The governmental bodies who would be constructing the new stadia made it known that

(Footnote continued on following page.)

its follow-the-franchise provisions to extend its grip on the market without the need for competition, and to capture the business of those who were not parties to contracts with it.

Financial inducements. Many examples are reviewed in Justice Clark's opinion, and there are many more. Sportservice never had a salesman other than the keeper of its pursestrings; it caused it to be generally known that large sums of money were available in exchange for long term contracts. This lure brought in those who could not obtain financing elsewhere and who were willing to let someone else worry about the future. Often, the inducement took the form of providing financing for the purchase of a team or a facility.[15] Such loans have ranged up to millions of dollars and have constituted barriers to competition which have excluded firms not possessing the assets resources of Sportservice. They were the means through which long term contracts have been imposed throughout the marketplace.

Sportservice claims that the front-end cash and loans are but a part of the price paid for a franchise—a so-called "prepayment" or "overpayment" (Petn. 17, 19). But, as

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(Footnote continued from preceding page.)

competitive bidding would be required for any concession contract. Sportservice solved the problem by entering private arrangements with the two teams which prevented the teams from moving to the new stadia unless Sportservice came along. In both cases, the temporary stadia were burdened with 25 year contracts, even though it was known that they would be used for only a short time. See 114a-115a.

In a similar vein, Sportservice introduced evidence to show that, when the Athletics Contract was executed in 1950, it was contemplated that the team would move to another city.

[15] The payment and loan which induced the Athletics Contract were made to relieve a cash shortage created when one of Connie Mack's sons was purchasing the ownership interest of his half-brother.

Justice Clark observed (121a), this is not true "where the benefit accrues to someone other than the team", as was the case where Sportservice made loans or payments to individuals in their personal capacities on condition that they cause teams to execute concession contracts.[16] Even if regarded as a part of price, these inducements are not "overpayments,"[17] and they hardly amount to "competition on the merits" (Petn. 6, 10, 17). Rather, they are predatory practices which evince specific intent. Just as a sale below cost by a seller may be regarded as something other than "vigorous price competition" (Petn. 10 n. 16), it is equally predatory for a buyer to loan to a seller at 3½% monies which that buyer has borrowed at 9%, particularly where the relevant competition is among buyers. Practices such as those carried out by Sportservice have been condemned by the courts[18] and properly were taken into account by the courts below.

Intent. This case presents the rare spectacle of a firm seeking a writ of certiorari in the face of findings of specific intent to restrain and to monopolize which have gone unchal-

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[16] For example, personal loans to Bill Veeck enabled him to acquire a minority, but controlling, interest in each of three different baseball teams. In consideration for his personal loans and as he had promised he would do, Veeck caused the teams to give Sportservice long term contracts before he sold out and moved on to another team. The Veeck transactions enabled Sportservice to tie down major league stadia in Cleveland, St. Louis and Chicago. See 110a, 112a, 116a.

[17] This case demonstrates that the value of front-end inducements dispensed by Sportservice is less than the damage inflicted upon a team in just a year or two by virtue of the low rates payable under a Sportservice contract. Contrary to repeated statements in the petition (pp. 3 n. 2, 5, 9, 16, 18), Finley never has contended that Sportservice "paid too much" for its contracts. The reverse is true.

[18] *United States* v. *National City Lines*, 186 F. 2d 562 (7th Cir. 1951), *cert. denied*, 341 U. S. 916 (purchase of stock for more than market price to obtain exclusive contracts); *Hastings* v. *Federal Trade Commission*, 135 F. 2d 253, 258 (6th Cir. 1946), *cert denied*, 328 U. S. 853 (loans to capture exclusive accounts); *United States* v. *American Can Company*, 87 F. Supp. 18, 28 (N. D. Cal. 1949) (cash payments to induce exclusive contracts).

lenged. Although given little deference by Sportservice, the significance of intent has been established and recognized by this Court since the first statement of the rule of reason.[19]

The findings of specific intent to restrain made by Justice Clark and Judge Peckham did not result from any presumption. Those findings, concurred in by the Court of Appeals, were based on careful evaluation of testimony and documentation relating to countless Sportservice transactions. The many transactions portrayed by the record here involve different forms of conduct and different methods of restraint, but they are united by a common thread: a consistent and continuing purpose to remove as many concession franchises as possible from exposure to competition for as long as possible. The lower courts' findings of specific intent would suffice to support the judgment below.[20] Here, of course, the courts below found *both* unlawful purpose *and* anticompetitive effects.

Summary. The finding of unreasonable restraint of trade in this case is bottomed on much more than "a merely mechanical analysis" (Petn. 6). Instead, the courts below have given consideration to all factors appropriate to a rule of reason inquiry and, in the face of anticompetitive purpose and effect, have found unreasonable restraint. There is no reason for further review.

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[19] *Standard Oil Co.* v. *United States*, 221 U. S. 1, 58; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.

[20] *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522, 525, 527 ("even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act" p. 525); *Times-Picayune Publishing Company* v. *United States*, 345 U. S. 594, 614, 622-23 ("the contracts may yet be banned by § 1 if unreasonable restraint was either their object or effect" p. 614); *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436 n. 13 ("a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect").

II.

THE FINDING OF ATTEMPT TO MONOPOLIZE WAS FULLY JUSTIFIED AND NO FURTHER REVIEW IS WARRANTED

Unless the finding of unreasonable restraint under Section 1 of the Sherman Act were to be set aside, no review of the attempt violation under Section 2 could have any practical effect on the ultimate result as between the parties. The Section 2 violation added nothing to Finley's damages, which would have been the same if only Section 1 had been violated.

The court below stated the elements of an attempt to monopolize violation[21] in a manner which draws no criticism from Sportservice (compare Petn. 12). In challenging the statement of the Court of Appeals that an attempt may be shown by "conduct alone" in certain cases (26a), the petition focuses solely on the "dangerous probability" element.[22] Contrary to the suggestion of Sportservice (Petn. 4), the opinion below made it clear that the Ninth Circuit, like other circuits, has not "eliminated" the need for showing dangerous probability. There is no conflict among the circuits as to the elements of an attempt.

The attack here actually is directed not to the requisite elements of an attempt, but rather to the nature of proof required to establish dangerous probability. Sportservice contends that "only the Ninth Circuit" holds that neither proof of a

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[21] "A Section 2 attempt to monopolize claim requires proof of three elements: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success." 26a.

[22] Obviously, "conduct alone" can satisfy the "conduct" element stated by the Court of Appeals; and Sportservice does not deny that the "specific intent" element can be proven through conduct.

relevant market nor proof of the defendant's share of that market is required to show dangerous probability (Petn. 14). But, if that be the claimed shortcoming of the Ninth Circuit at which the petition is aimed, this case simply does not provide a proper vehicle for review. For, here, there has been proof of a relevant market and of Sportservice's share thereof. Despite the *language* of the court below regarding "conduct alone" (see 26a), the attempt violation was found and affirmed by the courts below only after elaborate inquiry established that Sportservice has total control over 24% of a judicially defined national market.

It is obvious that this is not the case in which to review statements made by the Ninth Circuit in other cases. Furthermore, the language from some of the earlier Ninth Circuit decisions cited by Sportservice (Petn. 14) already has been subsumed in later cases originating from that circuit. The Ninth Circuit continues to modify, refine and restate its verbalization of the attempt offense, as can be seen from its compendious opinion in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F. 2d 1014, 1027-1031 (9th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3254 (U. S. Oct. 4, 1982) (No. 81-2083). This is part of the "ripening" process which confirms the wisdom of this Court's abstention to date. This Court repeatedly has declined to grant certiorari in attempt cases originating from all circuits—most recently and most notably in the *Inglis* case, wherein the petitioner launched an all-out attack against a recent articulation of the attempt offense fashioned by the Ninth Circuit. The time is not ripe to interrupt the ongoing evolutionary process within that circuit and others.

Sportservice makes little to no effort to demonstrate why the attempt violation found here is worthy of review. Both trial judges found a specific intent to monopolize. Those findings were based on hard evidence relating to scores of transactions over a period of many years; no "presumption" was needed or employed to arrive at the critical intent findings; and those

findings were not even challenged on appeal. The record shows Sportservice to be the world's largest concessionaire, dominant in its field, with demonstrated financial ability to do whatever it wants. It has exhibited an intent to destroy competition for concession contracts, has employed anticompetitive conduct toward that end, and, as a consequence of that conduct, already has sewn up 24% of a national market, comprised of individual monopolies, for years to come.[23] Where such a start has been made by a firm with both specific intent to monopolize and the wherewithal to effectuate that intent, the threshold of an attempt violation has been crossed. Compare, e. g., *Kearney & Trecker Corporation* v. *Giddings & Lewis, Inc.*, 452 F. 2d 579, 598-599 (7th Cir. 1971), *cert. denied*, 405 U. S. 1066, with *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F. 2d 919, 925 (9th Cir. 1980), *cert. denied*, 450 U. S. 921.

The market share of Sportservice is greater than the 22% that was found sufficient to support an attempt claim in *Inglis* and, given the unique characteristics of the market here, understates its true market power. Giving due consideration to all of the facts and circumstances of record, it certainly could not be said that the Sportservice share is so trivial as to afford it immunity as a matter of law. No court from any circuit has purported to establish any given market share as a haven of *per se* legality, and review should not be granted for any such purpose.[24] Moreover, if there were any magic in percentages,

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[23] There simply is no basis for the repeated claim that the market share of Sportservice "was declining" (Petn. 4 n. 4, 11) or "has declined" (Petn. 11 n. 18). No court below has so found; the record references cited do not support the claim; and it is untrue.

[24] The hornbooks might prefer a talismanic test under which X% of a market would be required to "monopolize" and Y% would be required for an attempt. But the attempt offense is designed to reach more than second class monopolies. Such a test would provide a safe harbor for the violator. It would strip the attempt offense of any

(Footnote continued on following page.)

the attempt violation here could not be overturned without considering the 50% market share determined by Justice Clark on the basis of a submarket which should not have been rejected as a relevant market in the first place.[25]

Finally, any review of the attempt to monopolize violation also would necessitate consideration of the offense of conspiracy to monopolize under Section 2. Justice Clark found the latter violation to be present, and that finding never has been overturned. Even if the degree of success already attained were to serve as the measure of attempt liability, there is no basis for engrafting a similar test upon the conspiracy offense.

(Footnote continued from preceding page.)

independent significance and would leave a hollow in antitrust enforcement within which blatant and damaging anticompetitive conduct would be immunized so long as it was perpetrated by a single firm whose market share fell below the requisite percentage. The Ninth Circuit has evidenced a sensitivity to these problems, to the history of the Sherman Act, and to the pronouncements of this Court. See, e.g., *Greyhound Computer Corporation* v. *International Business Machines Corporation*, 559 F. 2d 488, 504-505 (9th Cir. 1977), *cert. denied*, 434 U. S. 1040, and the authorities there cited.

[25] Contrary to the claim of Sportservice (Petn. 3 n. 3), Justice Clark did *not* focus on the market for "sale of concession items to the public". See 123a. He recognized that the relevant competition was that among concessionaires seeking to obtain concession contracts. It mattered not who was buyer or seller under these contracts, since the competition to obtain them remained the same, and since Justice Clark examined the market from the standpoint of both buyer and seller in any event. 107a-108a. The reversal of Justice Clark's market findings followed from the refusal of the first panel of the Court of Appeals to recognize that competition for major league baseball concession contracts could constitute a relevant submarket. Characterizing Justice Clark's finding of a relevant market as a "conclusion of law", the first panel summarily dismissed all of this Court's submarket cases as "inapposite". See 87a. Among the authorities so shunted aside was Justice Clark's own opinion in *International Boxing Club* v. *United States*, 358 U. S. 242, which so clearly supports his finding of a relevant submarket in this case.

III.

THE DAMAGE AWARD HERE, UNCHALLENGED IN THE COURT BELOW, SIMPLY PROVIDES COMPENSATION FOR ANTITRUST INJURY WHICH WAS SUSTAINED IN FACT

A writ of certiorari should not be granted to consider the injury and damage issues raised by the petition but not presented below. Before Judge Peckham, Sportservice offered no arguments whatever concerning Finley's damages. In the Court of Appeals, its only comments came in its answering brief on the cross-appeal—wherein Sportservice acknowledged its default in the trial court by stating that Judge Peckham had "in effect by stipulation carried forward the figures of Justice Clark" (p. 31)—and wherein Sportservice ridiculed Finley's request for an inflation adjustment to "a judgment concededly accurate if in fact there was any liability at all" (p. 32, n. 14).

Even if the present injury and damage arguments remained available to Sportservice, they are not worthy of review. Finley's damage award was proper under existing standards which have evolved from frequent and recent decisions of this Court and which require no further amplification.

Whether Sportservice was guilty of either or both of the violations found below, Finley's injury and damages are precisely the same. The injury was inflicted through enforcement of the Athletics Contract, which limited Finley to 29% of concession revenues. The record amply demonstrates that, wherever competition has been permitted, it has resulted in dramatically higher returns for comparable concession opportunities. See, e.g., 126a. Had Finley been able to partake of competition, each extra dollar which it would have received from concessions would have represented a dollar of profit. Finley sustained direct injury in fact.

Finley's injury was antitrust injury. Its business was "within that area of the economy which is endangered by a breakdown of competitive conditions".[28] It was an economic actor in the market restrained, but its participation in that market was precluded. Although Finley was not a competitor[27] of Sportservice, the injury it suffered was "inextricably intertwined" with the injuries sought to be inflicted on the market.[28] Indeed, its injury was inflicted directly by the violator as a means of effecting the violation and as a "necessary step" and "integral aspect" thereof.[29] The injury was clearly foreseeable as "the type of loss that the claimed violations . . . would be likely to cause";[30] it was "injury of the type the antitrust laws were intended to prevent".[31] In direct contrast to the plaintiffs in *Brunswick*, Finley seeks the profits it would have realized had competition been *permitted*.[32]

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[26] *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F. 2d 122, 129 (9th Cir. 1973).

[27] As the Court stated in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Company*, 334 U. S. 219 at 236: "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these."

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U. S. 134, relied upon by Sportservice (Petn. 17, 18), makes it clear that non-competitor parties to exclusive dealing contracts may recover for damages resulting from the restrictive portions of those contracts.

[28] *Blue Shield of Virginia* v. *McCready*, 73 L. Ed. 2d 149, 164.

[29] *Id.* at 161.

[30] *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U. S. 100, 125.

[31] *Brunswick Corporation* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489. The Sherman Act insists upon competition to enable those who deal with competing parties to benefit from competition among those parties; Finley obviously is within the class which would benefit from competition among concessionaires.

[32] In *Brunswick*, the plaintiff sought "the profits they would have realized had competition been *reduced*". 429 U. S. at 488, emphasis added.

As to measure of damages, Sportservice cites *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U. S. 557, 566: "what plaintiff's situation would have been in the absence of defendant's antitrust violation" (Petn. 16). That is precisely the standard applied in 1972 by Justice Clark,[33] who fixed damages by comparing the concession payments received by Finley from Sportservice with the *minimum* payments available under a comparable contract awarded as the result of competition. Sportservice complains that the comparison was improper because it related to "different places" (Petn. 17). This contention is frivolous.[34]

The primary thrust of the petition is that certiorari should be granted to permit Sportservice to claim an "offset" which it never has requested before (Petn. 16-19). In developing this new theory, the petition suggests that Finley has "derived" (p. 18) and has been allowed to "keep" (p. 5) or "retain" (p. 19) the "prepayments" (p. 17) or "overpayments" (p. 19) made by Sportservice as inducements to procure the Athletics Contract in 1950—*i. e.*, a $150,000 cash payment and a

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[33] "Finley is entitled to recover its damages, the measure of which is the difference between what it would have received had there been no illegal restraints and what it actually received under the 1950 contract." 126a.

[34] There obviously could be no evidence of competitive offers for the Athletics concession business during the 4 year damage period (1964-1967) when Sportservice was entrenched at Kansas City Municipal Stadium. But, in the very next year (1968), another major league baseball team replaced the Athletics in Kansas City, and a 4 year concession contract was awarded for the very *same stadium* through competitive bidding. The prevailing concessionaire guaranteed a minimum payment of $236,000 per year for baseball concessions alone, amounting to $944,000 over a 4 year period. During the preceding 4 years, Finley had received only $661,832 under the Athletics Contract. The difference, amounting to $282,168, was the amount of damages incorporated in the judgment below. 126a.

$100,000 loan.[35] Sportservice contends that any such extra benefits received by an antitrust victim from an antitrust violator should be offset against the damages suffered at the hands of that violator. For purposes of this petition, that proposition may be assumed to be valid—and there is no need to await further decision in any other case.[36]

The plain fact is that Finley never received any cash payments, loans or other extra "benefits" from Sportservice.[37] There appears no reason why Finley's damages should be reduced by what Sportservice paid to someone else 32 years ago, particularly in view of the fact that, as an integral aspect of its unlawful conduct, Sportservice purposefully and repeatedly has entered into sweetheart arrangements with initial contracting parties in order to ensnare their successors for generations to come.

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[35] The offset argument ignores the fact that the 1968 Kansas City contract which formed the basis for damage comparison (see n. 34, *supra*) required an investment of $300,000 by the prevailing concessionaire in addition to the guarantees previously mentioned (Pl. Exh. 523).

[36] Sportservice apparently would have the Court defer ruling on its petition pending decision in *Weyerhaeuser Co.* v. *Lyman Lamb Co.* (No. 81-1618). See Petn. 17 n. 26. It may be assumed that this Court will decide that all elements of price must be considered in *Weyerhaeuser*. But such a holding would have no bearing on the issues properly before the Court on the present petition.

[37] The beneficiaries of the $150,000 cash payment and $100,000 loan were the members of the family of Connie Mack. Finley received nothing more from Sportservice than 29% of concession revenues generated from home games during its ownership of the Athletics. Finley never received any part of the $150,000 payment (which had been fully amortized before this litigation was filed) and never received or had the benefit of any Sportservice loan in any amount at any time. See 54a.

Even if the above considerations be ignored, any offset theory would require additional proof. Accordingly, Sportservice requests that the case be *remanded* for recalculation of damages (Petn. 17, n. 26). As both courts below have emphatically noted (see 3a), this case should come to an end! The request for a remand which would breathe new life into this long pending suit should not be entertained in order to indulge a rank afterthought.

CONCLUSION

The decision below would close out 15 years of litigation with a fair and just result fully supported by identical findings made by two respected trial judges and unanimously affirmed. The import of the decision is limited to the immediate parties and to the facts of the case. The petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM G. MYERS
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345
Counsel of Record for Respondents

ROTHSCHILD, BARRY & MYERS
Two First National Plaza
Chicago, Illinois 60603
Of Counsel

APPENDIX K

EXCERPT FROM DISTRICT COURT MEMORANDUM AND ORDER, JULY 20, 1979

IN THE UNITED STATES DISTRICT COURT

For the Northern District of California

TWIN CITY SPORTSERVICE, INC., a Missouri corporation,
Plaintiff,

v.

CHARLES O. FINLEY & COMPANY, INC., an Illinois corporation,
Defendant.

Civ. No. 48234 RFP

CHARLES O. FINLEY & COMPANY, INC., an Illinois corporation,
Counterclaimant,

v.

TWIN CITY SPORTSERVICE, INC., a Missouri corporation; and SPORTSERVICE CORPORATION, a New York corporation,
Counterdefendants.

MEMORANDUM AND ORDER RE ATTORNEYS' FEES AND AMENDMENTS TO FINDINGS

[EXCERPT]

* * *

We also grant Finley's request that our 1978 memorandum be amended to include a correction and clarification of the concession franchises that we intended to include in the relevant market. The correction concerns specifically the amusement parks included in the relevant market. It was our intention to

exclude from the market those amusements parks having full kitchen operations, as well as those opened after 1970, and we relied on Defendant's Exhibit 1214 in counting 54 such facilities in the market. It now appears that the identifications of kitchen-equipped parks in that exhibit were incomplete and that 36 of those amusement parks did have kitchen operations, as indicated in Plaintiff's Exhibits 734, 739 and 805E. Thus only 18 amusement parks should have been included for a total of 118 franchises in the relevant market.

We also correct our market calculations to credit Sportservice with holding concession franchises at five of the 27 arenas with no major league sports, for a total of 23 franchises. Footnote 1 of that memorandum should accordingly be amended to include Kiel Auditorium in St. Louis, whose concession franchise as of 1970 had been the subject of consecutive Sportservice contracts of 3, 3, 3 and 5 years. Also in that footnote the citation to Plaintiff's Exhibit 606 should be changed to Plaintiff's Exhibit 609. The table appearing at page 4 of the 1978 memorandum should also be modified to reflect these corrections.

These corrections change the market share held by Sportservice from 19 percent to 24 percent. This of course provides even stronger support for our conclusion that Sportservice's restraints have foreclosed competition in a substantial portion of the relevant market.

Finley has asked us to clarify which concession franchises are included in our computations of the market by including in the 1978 memorandum specific references to lists of those facilities in the record and briefs. To this end, we direct the insertion of an asterisk and the following footnote after the word "Total" on line 4, page 4 of that memorandum:

> *The facilities to which these franchises relate are identified in Schedules I, II, III, IV and VII appended to Finley's post-trial brief. The amusement parks included are: La Brea Tar Pits, Los Angeles, Cal.; Funland, Reho-

both Beach, Del.; Marineland, St. Augustine, Fla.; Ringling Museums, Sarasota, Fla.; Lake Winnepesaukah, Rossville, Ga.; Ty Bee Amusement Park, Savannah Beach, Ga.; Adventure Land, Addison, Ill.; Funtown Amusement Park, Chicago, Ill.; Riverview Park, Des Moines, Iowa; Palace Playground, Old Orchard Beach, Me.; Jefferson National Expansion Memorial, St. Louis, Mo.; Meramac Caverns, Stanton, Mo.; Million Dollar Pier, Atlantic City, N.J.; Rockaway's Playland, Rockaway Beach, N.J.; West View Park, Pittsburgh, Pa.; Kennywood Amusement Park, West Mifflin, Pa.; Ruby Falls, Chattanooga, Tenn.; Fair Park, Nashville, Tenn. *See* Defendant's Exhibit 1214; Plaintiff's Exhibits 734, 739, 805E.

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Dated: July 20, 1979

/s/ ROBERT F. PECKHAM
Chief United States District Judge